STATE OF MICHIGAN

COURT OF APPEALS

ANN S. SOKEL,

Plaintiff-Appellant,

v

KMART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 5, 1999

No. 202121
Oakland Circuit Court
LC No. 96-515213 NO

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition of her negligence action pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff contends that the trial court erroneously granted defendant summary disposition when defendant's low cart corral railing was not an open and obvious danger. Plaintiff further claims that, even assuming that the railing was open and obvious, a question of fact existed regarding whether the railing posed a foreseeable risk of harm. We review de novo the trial court's order granting summary disposition. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition may be granted under MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 85. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. *Id*. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue on which reasonable minds might differ. *Id*.

Generally, a business invitor has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of his land. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite

knowledge of it on behalf of the invitee. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger on casual inspection. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). When the risk of harm remains unreasonable despite its obviousness or despite knowledge of it by the invitee, then circumstances may be such that the invitor is required to undertake reasonable precautions. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). The issue then becomes the standard of care and is for the jury to decide. *Id*.

In this case, the cart corral railing over which plaintiff fell constituted an open and obvious danger because it is reasonable to expect that the average person of ordinary intelligence would discover the long, thick railing on casual inspection. *Hughes*, *supra*. Besides the simple fact that the large railing is readily discernible on casual inspection, plaintiff indicated that nothing obstructed the railing from her view and that she did in fact observe the railing before attempting to step over it.

Because the railing represented an open and obvious danger, defendant owed plaintiff no duty of reasonable care unless the risk of harm posed by the railing remained unreasonable despite the fact that plaintiff discovered the danger. *Bertrand*, *supra*. In opposing defendant's motion for summary disposition, plaintiff submitted incident reports, prepared by employees of the Kmart store in which she fell, indicating that there had been numerous other incidents involving the railing surrounding the cart corral. Specifically, the reports reveal that within the approximately eight-month period immediately preceding plaintiff's injury, six other customers had also tripped and fallen over the cart corral railing. Thus, these incident reports establish circumstances that create a genuine issue of material fact regarding whether the open and obvious railing presented an unreasonable risk of harm, *Singerman*, *supra* at 140-141, and whether defendant should have reasonably expected that plaintiff would injure herself on the railing despite its open and obvious nature. *Bertrand*, *supra*. Because whether a risk of harm is unreasonable is a question of fact, the existence of duty as well as breach become questions for the jury to decide. *Bertrand*, *supra* at 617. Therefore, we conclude that the trial court improperly granted defendant summary disposition pursuant to MCR 2.116(C)(10).

Furthermore, the trial court also erred to the extent that it summarily disregarded the incident reports as inadmissible, without permitting plaintiff an opportunity to establish the requisite foundational requirements for admission as a hearsay exception under MRE 803(6). Although no lower court record exists from which we may definitively determine whether the incident reports constitute records of regularly conducted business activity, we note that these reports were apparently prepared by Kmart employees on a standard business form, and we recommend that the trial court consider the applicability of MRE 803(6) to these reports.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage